No. 88-2093

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

RICHARDSON ENGINEERING COMPANY,

Petitioner,

vs.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THADDEUS C. RACZKOWSKI
RACZKOWSKI & KRENZEL
Attorneys for Petitioner
21 Ernston Road
Parlin, New Jersey 08859
(201) 525-0080

9051
Lutz Appellate Printers, inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTIONS PRESENTED

1. Whether the decisions below are inconsistent with and in conflict with the holdings in *Celotex Corporation v. Myrtle Nell Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and with the decisions of the Court of Appeals for the Second Circuit in *Wyler v. United States*, 725 F.2d 156 (2d. Cir. 1983) and *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987) regarding the burden of a non-moving party to successfully oppose a summary judgment motion.

2. Whether or not a conflict exists between the decision of the Court of Appeals for the District of Columbia Circuit in *U.S. Industries v. Blake Construction Company*, 671 F.2d 539 (D.C. Cir. 1982) and the decisions below regarding the admissibility of the methodology utilized by petitioner's expert witness to establish its acceleration damages to which the jury found it entitled.

LIST OF ALL PARTIES

The parties in this action in the court below were William L. Crow Construction Company, Plaintiff-Respondent; Richardson Engineering Company and Harry A. Richardson, Defendants; and Richard Engineering Company, Defendant-Appellant.

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No.

In The

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RICHARDSON ENGINEERING COMPANY,

Petitioner,

vs.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Richardson Engineering Company (hereinafter referred to as "RECO"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 3, 1989.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Second Circuit, not reported, appears in the Appendix to this

Petition (3a-5a). The order denying a rehearing en banc, entered March 28, 1989 is also unreported and appears in the Appendix (1a-2a). The opinion and order of the United States District Court that resulted in the appeal to the Court of Appeals was entered on January 30, 1987 (L1-L35).*

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1989. Within the time prescribed by Rule 40 of the Federal Rules of Appellate Procedure, petitioner filed a petition for rehearing and suggestion for rehearing en banc. That petition was denied by the Court of Appeals on March 28, 1989. This petition for certiorari is being filed within the 90-day period provided by 28 U.S.C. § 2101 and Rule 22 of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure. Rule 56 in set forth at pages 22a through 24a.

STATEMENT OF THE CASE

On or about June 29, 1979, William L. Crow Construction Company (hereinafter referred to as "Crow") agreed to be the general contractor for International Business Machines (hereinafter referred to as "IBM") for a project to construct for IBM's benefit

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* A Lodging submitted and filed simultaneously herewith containing the Order and Opinion of the United States District Court of Vermont dated January 30, 1987, Affidavit of Harry A. Richardson with Attachments filed April 26, 1985 and Appellant's Brief in Opposition to Appellant's Motion for Partial Summary Judgment with Attachments.

a semiconductor manufacturing building with related utilities. Said building was to be a part of the IBM complex of manufacturing facilities located in Essex Junction, Vermont.

As general contractor, Crow requested and received bids from various subcontractors, including RECO. Following that invitation to bid, RECO's President, Harry A. Richardson, Jr., traveled to Crow's Manhattan offices in early fall of 1979 to meet with Gene Martin of Crow who was in charge of the bidding process. At that time, Mr. Richardson requested all available information which would be relevant to bid, including a copy of the contract agreement between Crow and IBM. Mr. Richardson received certain drawings and specifications, but was informed that the IBM/Crow contract was not available and, accordingly, was required to bid on the job without any knowledge of the provisions thereof.

After reviewing the drawings and specifications and conducting an inspection of the Essex Junction job site, RECO submitted a proposal on November 2, 1979. Following a series of discussions with Crow as to the scope of the work and the proposed price of the mechanical subcontract, Harry A. Richardson, Jr. met with the IBM Real Estate and Construction Division representatives on December 11, 1979 at IBM's offices in Rye Ridge, New York. At that meeting, Crow confirmed that the project and utility work would be run in accordance with a Critical Path Method (CPM) schedule and the design and construction critical dates were confirmed. Later in the meeting, RECO was notified that it had been awarded the mechanical subcontract and was given a verbal order to proceed with the work, although no contract was executed at the time.

Once the subcontract was awarded at that December 11, 1979 meeting, RECO immediately undertook the mobilization of labor forces and commenced work at the job site within a few days.

RECO received a proposed subcontract from Crow on February 19, 1980. On February 25, 1980, RECO forwarded to Crow an executed subcontract agreement. The subcontract was forwarded "subject to" various clarifications. Among these exceptions was a request for the contract between Crow and IBM in order that the subcontractor could "review the terms and conditions which you want us to assume". The February 25, 1980 correspondence also discussed the time of completion, the cost of job extensions and included a detailed list of all contract drawings which had been supplied to RECO at bid time and which it agreed to incorporate into the subcontract. The list also identified drawings that RECO did not have in its possession at bid time.

Crow responded by a letter dated March 4, 1980 indicating that it had consulted with its attorneys regarding the February 25, 1980 letter, that it agreed with the request that the Crow/IBM Contract would be supplied (it was not) and further agreeing that the drawings enumerated in RECO's February 25, 1980 letter were the ones to control the subcontract agreement. That correspondence was answered in a March 14, 1980 letter in which RECO again requested the general contract. A further and more detailed list of specifications on which RECO relied was forwarded. Although there was no response by Crow to RECO's March 14, 1980 letter, Crow eventually executed the subcontract and returned it without comment. Final execution by Crow apparently occurred in June of 1980.

In the meantime, Crow announced in the subcontractor's meeting of January 10, 1980 and again at the subcontractor's meeting of January 23, 1980 that there would be no time extensions granted on the project. In view of the fact that RECO was contractually entitled to an extension of time for at least 14 major items as of January 24, 1980 and other disruptions as measured by the CPM, RECO put Crow on notice as of January 24, 1980 that the refusal to grant an extension, as required under its

agreement, created a constructive acceleration to RECO and formally advised Crow that RECO must be compensated for all costs it incurred in this manner and that there would be a claim on the job.

The number of changes made to the work, design errors, design development and design omissions were enormous. RECO notified Crow on a regular basis as to the loss of productivity, inefficiency and other damages to RECO. Despite repeated written notices from RECO in regard to the need for extensions of time and acceleration costs generated by Crow's announced policy of not granting any time extensions, Crow failed and refused to give owner IBM written notice or requests for extensions of time and payment for RECO's acceleration costs until RECO was terminated on January 2, 1981. Thereafter, Crow did collect delay, job extension and acceleration costs for itself. As of January 2, 1981, RECO had completed 87% of its work (92% of the base subcontract work), as certified to by the Project Architect and Project Engineer.

Thereafter, Crow, winning the race to the courthouse, filed a complaint in the State of Vermont which was subsequently removed to the United States District Court for the District of Vermont on February 20, 1981. The basis for jurisdiction in the federal court was diversity of citizenship. Said action alleged breach of contract and sought from RECO, Crow's costs to complete the work, administrative costs due under the contract and costs of defending liens filed by RECO's suppliers. RECO answered denying that it breached and counterclaimed on February 25, 1981. RECO, in its counterclaim, essentially alleged that Crow breached the written contract, a subsequent oral contract on modification to pay RECO acceleration costs and for *quantum meruit*. Subsequent amended pleadings filed by Crow on August 21, 1984 added Harry A. Richardson, Jr. as a defendant.

After extensive and intensive discovery, including 23 days of depositions from Harry A. Richardson, Jr., Crow moved for summary judgment. After considering the motion for partial summary judgment for over 18 months, on January 30, 1987, in its opinion and order, the trial court granted Crow's motion for partial summary judgment with regard to delay, interference and acceleration damages requested in Counts I and III of RECO's counterclaim. The effect of this decision removed from the jury's deliberation the major portion of RECO's affirmative claim. The first trial began on June 9, 1987 and ended in a mistrial. A new trial by jury began on February 9, 1988. On April 13, 1988, an order was entered granting judgment to Crow in the amount of $546,375.00 and against RECO together with interest of $477,456.89 and $1,247,098.20 as an award of attorney fees for a total of $2,270,930.09 and granting judgment for Harry A. Richardson, Jr. against Crow (6a-8a).A subsequent motion for judgment, notwithstanding the verdict on claim for personal liability against Harry A. Richardson, Jr. was denied on August 16, 1988. RECO, thereafter, timely filed a notice of appeal. On February 3, 1989, the Court of Appeals for the Second Circuit affirmed the decision of the trial court (3a-5a). On February 17, 1989, RECO filed a petition for rehearing and said petition was denied on March 28, 1989 (1a-2a).

REASONS FOR GRANTING THE WRIT

I.

The decisions below are patently in conflict with decisions by this Court and prior decisions of the Court of Appeals for the Second Circuit.

There is no better or more accurate way to begin then to use the words of Judge Kaufman in *Donahue v. Windsor Locks Board of Fire Commissioners,* 834 F.2d 54 (2d Cir. 1987) at p. 57.

> Although the basic principles for granting summary judgment are well settled, the frequency of cases in which it is granted *improvidently* [emphasis added] persuades us that these tenets bear repetition. Fed. R. Civ. P. 56(c) provides, in part, that summary judgments shall be rendered only when a review of the entire record demonstrates "that there is no genuine issue as to any material fact". The burden falls on the moving party to establish that no relevant facts are in dispute. *Heyman v. Commerce & Industry Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975); *accord Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). Moreover, in determining whether a genuine issue has been raised, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (*per curiam*); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Therefore, not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding the inferences to be drawn from them. *Schwabenbauer v. Bd. of Educ.*, 667 F.2d 305, 313 (2d Cir. 1981), *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2313, 91 L.Ed.2d 202 (1986).

The decision below failed to apply and to follow those guiding principles in affirming the trial court's opinion granting Crow's motion for partial summary judgment in the following critical areas:

(1) All reasonable inferences and ambiguities arising from the material facts were not drawn against the moving party seeking summary judgment.

(2) There was controversy regarding the inferences to be drawn from the material facts.

(3) The affidavit of Harry A. Richardson, Jr. and the exhibits attached thereto submitted in opposition to the partial summary judgment motion were erroneously and improperly excluded from consideration by the trial court. Preliminarily and most importantly, it must be understood this is not a run of the mill matter, but rather a complex construction contract dispute in which the trial court, in its partial summary judgment opinion and order of January 30, 1987 concurred with and accepted RECO's legal arguments in support of its claim which totaled $4,925,613.00 and yet found against RECO in its opinion. *See* RECO's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and Attachments, specifically Attachment 2, Report on Damages by John McCarthy dated December 31, 1984 (L180).

The first issue critical to RECO's claims for damages treated by the trial court was whether or not the "no damages for delay" clause contained in the agreement between Crow and RECO barred RECO's claims. Properly, the trial court, citing *United States Steel Corp. v. Missouri-Pacific R.R. Co.*, 668 F.2d 435 (3d Cir. 1982), *cert. denied*, 459 U.S. 836 (1982); *Blake Construction Co. v. C.J. Coakley Co.*, 431 A.2d 569 (D.C. Aff. 1981) and *Northeast Clackamas C.E. Co-Op v. Continental Casualty Co.*, 221 F.2d 329 (9th Cir. 1955) acknowledged that such clauses are not enforceable when: (1) time extensions were wrongfully withheld as a remedy; (2) the delays were the result of behavior not contemplated by the parties; or (3) there is evidence of bad faith or active interference by the contractor with

the subcontractor's work (*see* L13).

Further, the trial court held, as argued by RECO, that the "no damage for delay" provision and the provision granting time extensions as the sole remedy for delay under the agreement between RECO and Crow are reciprocal and, accordingly, RECO, if wrongfully denied time extensions, could not be barred by the "no damage for delay" provision (*see* L14).

In determining whether or not Crow repudiated or waived the "no damage for delay" clause, the trial court found that RECO did allege, with sufficient factual support, the following facts:

(1) On January 10, 1980, Crow told Mr. Richardson at a subcontractor's meeting that no time extensions would be given for delays.

(2) On January 23, 1980, Crow again told Mr. Richardson of its policy against granting time extensions.

(3) On January 24, 1980, Mr. Richardson informed Crow in a memo that it would seek acceleration costs due to delays in approving a roof drainage system. This delay had created construction inefficiencies for Richardson. [In fact, the trial court is not referencing a memo, but a letter from Mr. Richardson to Crow which appears as attachment F (6) of Mr. Richardson's affidavit (L78-L79). This letter not only addresses the issue of Crow's policy of no time extensions, but also cites Crow's refusal to pay acceleration costs and, finally, to put Crow on notice that there will be a claim on the job.]

(4) On March 3, 1980, Mr. Richardson submitted to Crow an amended storm system change estimate proposal which included a request for an eight day time extension (L9-L10).

Incredulously, the trial court then found that such material facts were not sufficient to establish an unequivocal refusal by Crow to honor the time extension provisions of the written agreement between Crow and RECO since it was signed on February 25, 1980, subsequent to the announcement of Crow's policy not to give time extensions. Even more unbelievably, the trial court found that RECO believed that time extensions would be given despite Crow's policy against time extensions since RECO continued to give notice and request time extensions before and after February 25, 1980, the date that RECO signed the agreement with Crow.

Explicitly, instead of drawing reasonable inferences in favor of the non-moving party and against the party seeking summary judgment as it was required to do, the trial court did just the reverse. The trial court could and should have inferred that RECO, in giving notice, was insisting on its rights to time extensions in face of Crow's insistence that, despite everything, no time extensions would be given. At the very least, there is, from those material facts alone, a controversy regarding the inferences to be drawn which required a jury to decide at trial. *See Schwabenbauer v. Bd. of Educ., supra.*

It should be noted that the effect of the refusal to consider time extensions by Crow resulted in constructive acceleration forcing RECO to incur higher costs and expenses than bid or expected. *See* Letter of January 24, 1980 Attachment F (6) to the Affidavit of Harry A. Richardson, Jr. (L78-L79). Specifically, Paragraph 1 therein states that RECO would receive no payment for acceleration costs from Crow as a result of the policy against time extensions.

Further, Crow's policy to deny time extensions was not just recall of a party present at the job meetings of January 10, 1980 and January 23, 1980. The minutes were memorialized and appear

as attachments D (4) and E (5) to Mr. Richardson's affidavit. *See* specifically Item 48 of the Job Minutes of January 23, 1980 prepared by Crow, which provides:

> It was once again pointed out to subcontractors that no time extensions *of any kind* will be available under *any circumstances* on this job. The dates will be met. [Emphasis added.]

Certainly, there is nothing equivocal of such repudiation of time extensions and the reasonable inference to be drawn against the moving party is that its intention was never to honor its obligation to grant time extensions at any time. Crow was advising its subcontractors that it intended to breach its agreement in order to keep its schedule. Again, at the very least, the inferences to be drawn create a controversy that should have been determined at trial. Instead, at every opportunity, the trial court drew inferences against RECO, the non-moving party, and not against Crow.

From the material facts found by the trial court, there can be drawn reasonable and necessary inferences substantial enough to conclude that Crow waived or repudiated the "no damage for delay" provisions of its agreement with RECO and certainly enough to "generate uncertainty" so as to have required the trial court to have denied Crow's motion. *Quinn v. Syracuse Model Neighborhood Corp., supra.*

RECO, alternatively, had also argued that Crow was estopped to assert its protection under the "no damage for delay" provision of its agreement with RECO. In support thereof, RECO had argued that Crow had told RECO not to submit time extensions in its bids and that Crow delayed or withheld information concerning delaying conditions and that Crow abandoned the CPM. Despite the extensive and detailed affidavit and attachments

thereto by Harry A. Richardson, Jr., President of RECO (L36-L120), the trial court could find but one material fact—a letter of June 30, 1980—which the trial court describes as detailing numerous delays and informing Crow that RECO would need an extension of time and would impose "General Condition Costs". Said letter appears as attachment I to Mr. Richardson's affidavit and is properly dated as June 3, 1980, not June 30, 1980 (L113-115).

Inexplicably, the trial court did not include attachment G (7) and attachment H (8) of Mr. Richardson's affidavit (L80-L112) in its consideration. These attachments are storm system estimates requested by Crow. Attachment G (7) pointed out that an additional eight working days would be required and that would constitute an addition to the general conditions of $14,400.00. Attachment H (8) amends the estimate for the same storm system by deleting references to time extensions and, instead, recomports the costs by adding in all acceleration costs.

These bids for the same storm system are startling in their dissimilarities and beg for an explanation. These bids and their dissimilarities were referenced by RECO in its memorandum of law in opposition to plaintiff's motion for partial summary judgment (L130-L131) and, indeed, the trial court previously accepted and considered attachment G (7) as evidence of RECO's continuing requests for time extensions.

An explanation was proffered in Mr. Richardson's affidavit in paragraphs 12, 13 and 14 (L40-L41) but the trial court rejected consideration of those paragraphs and, in fact, rejected the entire affidavit of Mr. Richardson. The trial court found said affidavit to be self-serving, conclusory and largely devoid of factual support (L17).

The trial court, however, gives us no analysis of why it came

to those conclusions, unless, of course, by the very words of that affidavit it appears self-evident. However, any kind of analysis of that affidavit belies that it is conclusory and devoid of factual support. Firstly, all affidavits by parties to a lawsuit are self-serving and certainly there is no legal requirement preventing its consideration merely because it is self-serving. All that is required of an affidavit is that it contains specific facts or be based on first-hand knowledge. *Wyler v. United States*, 725 F.2d 156 (2d Cir. 1983). Further, Harry A. Richardson, Jr., under oath, states that the facts in the affidavit are true of his own personal knowledge. Clearly then, his affidavit differs substantially from the attorney's affidavit in *Wyler, supra*, and the affidavit excluded by the court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F. Supp. 873 (W.D. Tenn. 1972) which was based upon information and belief and not on personal knowledge. Harry A. Richardson, Jr., as the affidavit states, was awarded a bachelor's degree in mechanical engineering by Yale University in 1951 and was President of Richardson Engineering Company for 25 years. His depositions demonstrate that he personally attended nearly all of the weekly job meetings, which generally consisted of two separate meetings each week—one with the architect/owner and the other with the general contractor, Crow, and other subcontractors. Mr. Richardson kept notes of these various meetings and these notes were produced during the course of discovery and inspection. Additionally, Mr. Richardson personally received and reviewed the job correspondence during the course of the project. It is impossible to imagine that there existed any one person with more "personal" and "first-hand" knowledge and experience of what transpired between Crow and RECO and, it is clear on its face, that Harry A. Richardson Jr.'s affidavit was "grounded" and based upon his own personal knowledge. Therefore, the only supportable basis the trial court could rely upon to exclude consideration of Mr. Richardson's affidavit is if it were conclusory.

Paragraphs 12, 13 and 14 (L40-L41) are certainly not conclusory. They describe the job meetings of January 10 and 23 of 1980 and thereafter recount the substance of a meeting with representatives of Crow and IBM about the storm system bid. In particular, RECO was told not to seek time extensions, the reason for the requote, and then later not to submit acceleration costs either. The agreement between RECO and Crow and IBM was that acceleration costs caused by the policy of Crow not to grant time extensions would be resolved by claims at a later date (L40-41) Therefore, there is no legally sufficient reason for the trial court to have excluded from its consideration paragraphs 12, 13 and 14 of Mr. Richardson's affidavit. Further, once the trial court accepted those paragraphs as material facts, the only inference that could and ought to have been drawn is that Crow, from day one to RECO's termination, refused to give time extensions. Such inference then clearly establishes RECO's legal arguments of waiver, repudiation and estoppel.

RECO, in its memorandum of law in opposition to plaintiff's motion for partial summary judgment (L121-L219) argued that paragraph 17 of Mr. Richardson's affidavit provided the material facts sufficient to establish that Crow delayed furnishing or withheld furnishing critical information to RECO (L129-L133). As with paragraphs 12, 13 and 14 (L40-L41), paragraph 17 (L42) is not conclusory and it should have had the right to have been considered by the trial court.

Even more convincing of RECO's arguments directed to estoppel is the undisputed fact that the CPM (Critical Path Method schedule) was abandoned by Crow in August of 1980. However, the trial court found that Crow had the right to modify the CPM schedule and disclaim the accuracy or reliability of the CPM schedule. Once the CPM schedule was abandoned, however, there was no basis for granting time extensions since the amount of time was to be measured by the CPM schedules. The CPM is

not only a scheduling tool, but also the only procedure to determine if there is a chargeable delay on the project. *See Continental Consolidated Corp. v. United States,* (Commissioner's Report) 17 C.C.F. § 81, 137 (1972). By order dated December 1, 1972, the Court of Claims agreed with the commissioner's recommended conclusions and, in general, with the opinion, 200 Ct. Cl. 737 (1972). Therefore, the trial court ought to have considered the abandonment of the CPM as a material fact from which it should have inferred that Crow had no intention of granting time extensions.

The final legal argument offered by RECO that the "no damage for delay" provision is inapplicable was that the delays were the result of behavior not contemplated by the parties (L23-L24). The trial court did find that the deposition testimony of Fred Bethel, Crow's project manager, to the effect that the construction at Building 973 had the most change orders he had ever seen, was a material fact evidencing that the magnitude of delays was outside the contemplation of the parties at the time of contracting (L10). At the same time, at page 23 of the opinion and order of January 30, 1980 (L23), grudgingly, the trial court mentions paragraph 20 of Mr. Richardson's affidavit (L43-L44) which alleges over 1,000 changes made during the course of the project. Apparently, this paragraph is not self-serving and conclusory, but then the trial court goes on to say that the best evidence is the deposition of Fred Bethel, Crow's project manager, which is quoted and which describes the volume of changes on the project as "overwhelming". In the same breath, the trial court then found, as a matter of law and after considering the facts presented by the parties in the light most favorable to the non-moving party, citing *Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) that the delays were not so excessive as to have been beyond the parties' contemplation. Not only did the trial court confuse delays and changes, but lumped them all together. It is the magnitude of the changes to the work and not the delays

which is the issue the trial court was to consider (L24). To say the very least, the inference to be drawn from the testimony of Crow's employee is that there is sufficient evidence to conclude that those changes were not contemplated by the parties.

In a transparent attempt to support its conclusion, the trial court states at page 25 of its opinion and order (L25) that the material facts before it indicate that RECO knew when it signed its agreement that the project was at the "concept" stage, that it would be designed while construction was "ongoing", and that the numerous changes would be made in the design and construction of the project. This material fact is the trial court's inference from notes taken by RECO's project manager which state "Building is being designed as construction is ongoing" (L25). Even assuming and accepting the trial court's description of that material fact does not mean that Crow and/or RECO expected to be "overwhelmed" or that 1,000 changes would be forthcoming. The trial court again, despite the formula language citing *Addickes v. S.H. Kress & Co., supra*, did, in fact, draw inferences only against the non-moving party. There are other reasonable inferences the trial court should have drawn which would require determination by a jury. Additionally, it should be understood that the notes of RECO's project manager, if compared with item 9 of Job Minutes of January 10, 1980 (L66) would show that such notes are consistent with Crow's advising "that design changes will constantly occur during the construction and will have to be dealt with, as no extensions of time will be allowed".

Although it is not critical to this petition, the trial court clearly erred regarding its understanding of RECO's claims for acceleration, interference and disruption costs. The thrust of RECO's acceleration claims depends upon a finding that Crow refused to grant time extensions. Once there is that refusal, constructive acceleration occurs. The trial court, on the other hand, found that RECO did not keep premium time records and thereby

could not claim acceleration costs. The basis of its finding was the trial court's *misreading* of the depositions of Harry A. Richardson, Jr. and Sarma S.U.S. Ayyala (L30).

Any fair reading of those depositions clearly shows that the questions and answers were directed to acceleration costs and not the proper keeping of premium time records.

In summary, the trial court did not properly draw reasonable inferences from those material facts that the court found to be evidentiary; nor did the trial court draw inferences favorably towards RECO. If the trial court had followed the guidelines in *Donahue v. Windsor Locks Board of Commissioners, supra,* Crow's motion for partial summary judgment would have been denied—even without the trial court giving weight to Mr. Richardson's affidavit. If any weight were given to that affidavit, it is more than arguable that RECO could have been successful in seeking summary judgment and, in fact, the jury found that Crow breached its oral contract to pay RECO acceleration costs—on facts identical to those argued and presented in opposition to Crow's motion for partial summary judgment (18a). Unmistakably then, there was sufficient evidence favoring RECO for a jury to return a verdict in its favor. *See Anderson v. Liberty Lobby, Inc., supra.*

As to RECO's argument that the decisions below are in conflict with *U.S. Industries v. Blake Construction Company,* 671 F.2d 539 (D.C. Cir. 1982), it should be noted that, in the first phase of the trial on liability only, the jury found that Crow and RECO had entered into an oral contract after entering into a written agreement, pursuant to which Crow agreed to pay RECO additional money at the end of the job to compensate RECO for the cost of accelerating change order work. (Change order work being work ordered by the contractor that was not included in the contract.)

At phase two of the trial, at the request of Crow, RECO's expert was subject to voir dire. The trial court, although not very clear at all, appears to have held that the effect of acceleration was limited to the change order work and, since RECO's expert measured the cost of acceleration on both change orders and contract work, he could not testify. Such a holding is demonstrative of the court's confusion and misunderstanding regarding the differences between acceleration, interferences and disruption damages. Acceleration damage is essentially diminished productivity that occurs when a subcontractor or a contractor is required to do additional work within a limited time period, at an increased pace which necessarily impacts upon all work done, either under the contract or change order. *See Mobil Chemical Co. v. Blount Bros. Corp.*, 809 F.2d 1175 (5th Cir. 1987) and *S. Leo Harmony v. Binks Mfg. Co.*, 597 F. Supp. 1014 (S.D. N.Y. 1984).

Interference and disruption claims are caused by a contractor failing to properly coordinate work or failing to provide the means or environment necessary for work to be done. *See John E. Green Plumbing & Heating Co., Inc. v. Turner Construction Company,* 742 F.2d 965 (6th Cir. 1984). The effect of interferences or disruptions or delays, unlike acceleration, may or may not be limited. Acceleration and its consequent diminished productivity is pervasive.

Unlike the report of UMTA sought to be introduced into evidence in *City of New York v. Pullman Incorporated*, 662 F.2d 910 (1981), RECO's expert, and specifically his report, was neither tentative nor incomplete. Most importantly, RECO's expert was the same expert utilized in *U.S. Industries v. Blake Construction Company, supra,* and he utilized the very same methodology approved by that court.

The trial court abused its discretion because it just did not

realize or understand the nature of RECO's claim or the methodology used to prove that claim. The amount of damages claimed by RECO because of acceleration is certainly within a reasonable amount given that, at the date of RECO's termination, there were already some 55 change orders issued by Crow totaling several million dollars.

CONCLUSION

This case, in its present posture, casts a cloud upon due process and the right of every party to its day in court. This case is important, not only to litigant but also to others, as an illustrative and symptomatic improvidential use of summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

What distinguishes this case from others in which summary judgment had been used not very wisely, is that plainly, the trial court did not draw proper inferences from the material facts in evidence.

Despite the almost ritual-like repetition "that all ambiguities and all reasonable inferences are to be drawn against the moving party", the trial court neither drew such inferences nor recognized that, from the same fact, multiple inferences could be drawn so as to create a real dispute.

Given the extensive record at the time of the motion and the character of the error of the trial court, this petition presents a proper and real basis for this Court to amplify its standards in *Anderson v. Liberty Lobby, Inc., supra,* especially since your petitioner met its burden under the holdings of that case. For these reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review the judgment it entered in this case on February 3, 1989 (3a-5a).

Respectfully submitted,

THADDEAUS C. RACZKOWSKI
RACZKOWSKI & KRENZEL
Attorneys for Petitioner

Dated: June 23, 1989

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 28, 1989

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of March one thousand nine hundred and eighty-nine.

No. 88-7787

WILLIAM L. CROW CONSTRUCTION COMPANY,

Appellee,

-v-

RICHARDSON ENGINEERING COMPANY,

Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Richardson Engineering Company,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that

no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

s/ Cassidy
Chief Deputy Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING JUDGMENT OF THE DISTRICT COURT FILED FEBRUARY 3, 1989

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Third day of February, one thousand nine hundred and eighty-nine.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND
HONORABLE RICHARD J. CARDAMONE
HONORABLE LAWRENCE W. PIERCE
Circuit Judges,

Docket No. 88-7787

WILLIAM L. CROW CONSTRUCTION COMPANY,
Plaintiff-Appellee,

v.

RICHARDSON ENGINEERING COMPANY and HARRY A. RICHARDSON,

Defendants,

RICHARDSON ENGINEERING COMPANY,
Defendant-Appellant.

RICHARDSON ENGINEERING COMPANY,
Counterclaim-Plaintiff,

v.

WILLIAM L. CROW CONSTRUCTION COMPANY,
Counterclaim-Defendant.

Appendix B

Appellant Richardson Engineering Company appeals from a January 30, 1988 judgment of the United States District Court for the District of Vermont (Coffrin, C.J.), which granted in part appellee Crow Construction Company's motion for partial summary judgment, thereby dismissing Richardson's counterclaims alleging repudiation or waiver of certain provisions of the parties' subcontracting agreement and requesting damages for delays, interference and acceleration allegedly caused by appellee Crow. Appellant also appeals from an adverse final judgment dated April 13, 1988 with respect to appellant's breach of contract that granted damages in favor of appellee Crow.

We affirm the district court's grant of partial summary judgment for the reasons stated by Judge Coffrin in his careful opinion dated January 30, 1987. In particular, we agree with the district court that the Richardson affidavit is primarily composed of "conclusory statements" and unsubstantiated charges of misconduct on the part of appellee Crow. *See Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983) (party opposing motion for summary judgment cannot rely on conclusory statements). The district court correctly assessed the motion with regard to the evidentiary burden that Richardson Engineering would have had to bear to prove its claims of repudiation or waiver, and its claim for damages due to delays, interference and acceleration allegedly caused by Crow. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986) ("[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden").

Appellant argues that testimony proffered by its expert witness McCarthy concerning damages was improperly excluded. Evidentiary rulings are typically committed to the sound discretion of the trial court. *E.g., City of New York v. Pullman, Inc.*, 662

F.2d 910 (2d Cir. 1981). The trial court here found the proffered expert evidence to be overly speculative because proof of causation was lacking regarding the accelerated costs.

Appellant contests the district court's decision to award attorney's fees in the amount of $1.2 million. Richardson asserts that the award here so dwarfs the actual recovery as to be unreasonable. We review such awards with great deference to the district court's award. *See, e.g., Nemeroff v. Abelson*, 704 F.2d 652, 656 (2d Cir. 1983) (party contesting award must show "that the decision to award attorney's fees . . . exceeded a reasonable and restrained exercise of discretion"). After protracted discovery, various motions and trial on the merits of a complex breach of a $10 million contract claim, the district court's decision to reduce appellee's request by $500,000 and award $1,247,098.20 attorney's fees cannot be said to be unreasonable.

The judgment of the district court is affirmed.

s/ Ellsworth A. Van Graafeiland,
Ellsworth A. Van Graafeiland,
U.S.C.J.

s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

s/ Lawrence W. Pierce
Lawerence W. Pierce, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX C — ORDER ENTERING JUDGMENT ON VERDICT WITH INTEREST AND FEES FILED APRIL 13, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 81-63

William L. Crow Construction Company

v.

Richardson Engineering Company and Harry A. Richardson, Jr.

Richardson Engineering Company

v.

William L. Crow Construction Company

ORDER

By Order dated March 18, 1988 the parties were directed to confer and endeavor to reach agreement as to the amount of interest and attorney fees to be awarded to plaintiff as additional damages in this cause. By letters dated March 29, 1988 setting forth their respective positions the parties advised the court that they were unable to agree as to either the amount of interest or attorney fees. Nevertheless, at the hearing held on April 8, 1988 the parties did agree as to the amount of interest and the reasonableness of certain attorney fees. Plaintiff at that time also waived its claim for reimbursement for certain attorney fees. Following arguments by counsel, the parties agreed that the court

should determine the reasonableness of those attorney fees to which the parties were unable to agree. No evidence was presented on the attorney fee question.

Now therefore, relying in part on its informed discretion, the court finds as follows:

1. Plaintiff is entitled to recover from defendant Richardson Engineering Company simple interest at the rate of 12 percent per annum to the date of this order in the amount of $477,456.89.

2. Plaintiff is entitled to recover from defendant Richardson Engineering Company, attorney fees paid by plaintiff to Latham, Eastman, Schweyer and Tetzlafff, Esqs. to the date of this order in the amount of $147,098.20.

3. Plaintiff is entitled to recover from defendant Richardson Engineering Company attorney fees paid by the plaintiff to Surrey, Morse, Jones and Day, Esqs., Wickens, Koches and Cale, Esqs. and Dinse, Erdmann and Clapp, Esqs. to the date of this order in the amount of $1,100,000.00.

4. The claim for attorney fees paid by plaintiff to Levine, Morgulas & Foreman, Esqs. is waived.

5. The award of interest and attorney fees to the date of this order total $1,724,555.09.

Among the factors considered by the court in determining the reasonableness of the attorney fees to be recovered by plaintiff from defendant Richardson Engineering Company in this matter are the following: (1) The schedule of attorney fees prepared by plaintiff and submitted to the court, (2) the factual and legal

complexities associated with plaintiff's claim against defendant arising out of the contract between the parties and plaintiff's claim necessitated by the removal of various liens filed by creditors of defendant against the property of IBM, (3) the arguments of counsel at the hearing, (4) the time devoted to this matter by counsel as observed by the court, (5) the court's general experience and knowledge with respect to time and charges of attorneys in previous matters of a similar nature that have come before it.

The Clerk shall enter judgment for plaintiff to recover of defendant Richardson Engineering Company the amount of the jury verdict in the amount of $546,375.00 together with the amount found herein of $1,724,555.09 for a total amount due plaintiff of $2,270,930.09.

The Clerk shall enter judgment for defendant Harry A. Richardson, Jr. personally against the plaintiff.

SO ORDERED.

Dated at Burlington in the District of Vermont, this 13th day of April, 1988.

s/ Albert W. Coffrin
Albert W. Coffrin
Chief Judge

APPENDIX D — JUDGMENT FILED APRIL 13, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Case Number 81-63

William L. Crow Construction Company

v.

Richardson Engineering Company and Harry A. Richardson, Jr.

Richardson Engineering Company

v.

William L. Crow Construction Company

x Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Judgment is entered for the Plaintiff to recover of Defendant Richardson Engineering Company the sum of $2,270,930.09.

Judgment is entered for Defendant Harry A. Richardson, Jr. personally against the Plaintiff.

Post judgment interest rate 7.01%.

Appendix D

Dated: April 13, 1988

LEONARD W. LAFAYETTE
Clerk

s/ Cowol J. Parat
Deputy Clerk

APPENDIX E — SPECIAL VERDICT WITH INTERROGATORIES, PHASE I, FILED MARCH 7, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action
File No. 81-63

William L. Crow Construction Company

v.

Richardson Engineering Company and Harry A. Richardson, Jr.

Richardson Engineering Company

v.

William L. Crow Construction Company

SPECIAL VERDICT WITH INTERROGATORIES

CROW'S BREACH OF CONTRACT CLAIM

Question No. 1

Did defendant Richardson Engineerng Co. breach one or more of the terms of its construction subcontract with plaintiff Crow Construction Company? (See pp. 19-22) (yes or no)	*Yes*

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Question No. 2

Which of the following terms of the subcontract did Richardson breach?
Question No. 3

USE THE FIRST COLUMN ON PAGE 3 FOR ANSWER

Question No. 3

Were any of the breaches identified in Question No. 2 *material* breaches? (See pp. 30-33) (yes or no)

Yes

If you answer "no" to Question No. 3, skip Questions Nos. 4 through 8 and go to Question No. 9.

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Question No. 4

If your answer to Question No. 3 was "yes", which of the following terms of the subcontract did Richardson materially breach?

USE SECOND COLUMN ON PAGE 3 FOR ANSWER

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Question No. 5

Did Crow voluntarily and knowingly waive its right to terminate for any of the material breaches you may have found in Question No. 4 by failing to act on those breaches within a reasonable time? (See pp. 36-38) (yes or no)

USE THIRD COLUMN ON PAGE 3 FOR ANSWER

Question No. 6

With respect to each unwaived material breach by Richardson did Crow comply with Article 21 notice provisions? (See p. 34)

USE FOURTH COLUMN ON PAGE 3 FOR ANSWER

Question No. 7

With respect to unwaived material breaches for which Crow did not comply with Article 21's notice provisions, did Richardson waive its right to notice and an opportunity to cure prior to termination? (See pp. 34-35) (yes or no).

Yes

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Question No. 8

With respect to each unwaived material breach for which Crow did not provide notice of termination and for which Richardson did not waive such notice, was such breach a "vital" breach? (See pp. 35-36) (yes or no).

USE FIFTH COLUMN ON PAGE 3 FOR ANSWER

[page 3]

CROW'S BREACH OF SUBCONTRACT CLAIM

Enter "yes" or "no" in the spaces below to answer Questions 2, 4, and 5 through 8. Leave space blank if no answer required.

CONDITIONS:	(1) Breach (Ques. 2)	(2) Material Breach (Ques. 4)	(3) Breach Waived (Ques. 5)	(4) Notice Provided (Ques. 6)	(5) Vital Breach (Ques. 8)
a. Becoming insolvent during the course of performing the subcontract as a result of its own actions and not those of plaintiff. (See pp. 22-24)	Yes	Yes	No	No	Yes
b. Making false certifications that defendant had properly paid all persons supplying labor, materials or services at the project. (See pp. 24-25)	Yes	Yes	Yes	—	—

	(1) Breach (Ques. 2)	(2) Material Breach (Ques. 4)	(3) Breach Waived (Ques. 5)	(4) Notice Provided (Ques. 6)	(5) Vital Breach (Ques. 8)
c. Failing to hold progress payments in trust, as required under the subcontract. (See pp. 25-26)	Yes	Yes	Yes	—	—
d. Knowingly making false certifications in one or more progress estimates that work had been completed for which payment was requested. (See pp. 26-27)	No	—	—	—	—
e. Failing to supply reasonably accurate and current financial statement. (See p. 27)	No	—	—	—	—
f. Failing to pay taxes as required under the subcontract. (See pp. 27-28)	Yes	Yes	No	No	Yes
g. Failing to secure lien waivers and releases from subcontractors and suppliers. (See pp. 28-29)	Yes	No	—	—	—

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PERSONAL LIABILITY OF HARRY RICHARDSON

Question No. 9

Did Harry Richardson agree to financially guarantee Richardson Engineering's performance under the subcontract and does Richardson's March 14, 1980, letter fully express that agreement? (See p. 40) (yes or no) *No*

Question No. 10

Did Harry Richardson orally agree to financially guarantee Richardson Engineering's performance under the subcontract and did Crow fully perform to its detriment in reliance on this promise? (See pp. 40-41) (yes or no) *No.*

Question No. 11

Was Harry Richardson the "alter ego" of Richardson Engineering? (See pp. 41-44) (yes or no) *No*

Appendix E

RICHARDSON'S BREACH OF SUBCONTRACT CLAIMS

Question No. 12

Did Crow breach the subcontract by wrongfully terminating the subcontract as to Richardson? (See pp. 44-47) (yes or no) *No*

RICHARDSON'S ORAL CONTRACT COUNTERCLAIM

Question No. 13

Did Crow and Richardson enter into an oral contract after entering into the written subcontract, pursuant to which Crow agreed to pay Richardson additional money at the end of the job to compensate Richardson for the cost of accelerating change order work? (See pp. 47-51) (yes or no) *Yes*

s/ Roger Livingston
Foreperson

Appendix E

APPENDIX E — SPECIAL VERDICT WITH INTERROGATORIES, PHASE II, FILED MARCH 18, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action
File No. 81-63

William L. Crow Construction Company

v.

Richardson Engineering Company

Richardson Engineering Company

v.

William L. Crow Construction Company

SPECIAL VERDICT WITH INTERROGATORIES

	Add figures in each column.	
	Crow	Richardson
1. Crow's cost to complete Richardson's work:		

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(a) What costs did Crow reasonably incur in completing Richardson's base contract work and in completing work begun by Richardson under approved change orders?	$2,534,416	
(b) Uncollected back charges paid by Crow for the benefit of Richardson (stipulated).	$101,036	
(c) Add the figures from a and b.		$2,635,452
2. Administrative burden allowance provided for by the subcontract: Enter 15 percent of the figure from Question 1(c).		$395,318
3. Amount IBM paid to Crow for completing Richardson's work (stipulated).		1,302,506
4. (a) Which party is responsible for payment for the air dryer and air compressor? (Crow or Richardson)	Crow	
(b) If you answered "Crow" in answer to (a), enter $168,088. If you answered "Richardson," enter $0.		$168,088
5. Expense Crow incurred for bonds in order to remove liens attributable to Richardson (stipulated).	$48,536	

Appendix E

6. Retainage withheld by Crow for progress payments to Richardson (stipulated).		$957,848
7. What is the reasonable value of work performed by Richardson not reflected in change orders?		$-0-
8. (a) Did Crow convert any of Richardson's tools and/or equipment? (yes or no)	Yes	
(b) If you answered "yes" to (a), what is the reasonable value of the converted tools and/or equipment? If you answered "no" to (a), enter $0.		$104,489
9. TOTALS: Add figures in each column.	$3,079,306	$2,532,931
10. Subtract smaller total from larger total. This is the amount of your verdict.	$546,375	
The verdict is in favor of the party with the larger total. The verdict is in favor of (Crow or Richardson).	Crow	

s/ Roger Livingston
Foreperson

APPENDIX F — RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to á judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the

evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversey and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversey, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appeal from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be

obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses with the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be ajudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)